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86-162

No.

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

IN RE JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND JAMES I. OWENS, ACTING COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE ROBERT L. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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9pp

QUESTION PRESENTED

Whether various individuals and organizations have standing, on the basis of their status as clergy or voters, to sue the government for declaratory and injunctive relief requiring the government to revoke the tax exemption of the Roman Catholic Church.

PARTIES TO THE PROCEEDING

Abortion Rights Mobilization Inc., Lawrence Lader, Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Laurel Clinic, Inc., Milan M. Vuitch, M.D., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproduction Health Services, Inc., Hagerstown Reproductive Health Services, Inc., Women's Health Services, Inc., Jane C. Delgado, Jennie Rose Fifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are plaintiffs in the district court and are respondents here under Rule 27.2(b) of the Rules of this Court.

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IN RE JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND JAMES I. OWENS, ACTING COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE ROBERT L. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The Solicitor General, on behalf of James A. Baker, III, Secretary of the Treasury and James I. Owens, Acting Commissioner of Internal Revenue, petitions for a writ of prohibition or mandamus* directed to the United States District Court for the Southern District of New York and the Honorable Robert L. Carter, judge of said court.

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* There is little practical difference between the two writs of mandamus and prohibition. See 16 C. Wright & A. Miller, *Federal Practice and Procedure* § 3932, at 206-207 (1977). Like mandamus, its more familiar counterpart, the writ of prohibition "is directed against unwarranted assumptions of jurisdiction or excesses of it." *Ex parte United States,* 263 U.S. 389, 393 (1923). In this case, the label to be affixed to the writ depends upon whether the appropriate relief is viewed as prohibiting the district court from proceeding to hear this case or, alternatively, ordering the district court to dismiss the case. In either event, issuance of the writ requires consideration of the same factors, and the precise label attached to the writ does not matter. See *Ex parte Simons,* 247 U.S. 231, 239-240 (1918). For convenience, we will use the term "mandamus" to refer to mandamus or prohibition.

OPINIONS BELOW

The opinions below are described at page 1 of the petition in *Baker* v. *Abortion Rights Mobilization, Inc.*, filed today, and the opinions are set forth in the appendix to that petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and Rule 26 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

The statement of the case is set forth at pages 2-10 of the petition in *Baker* v. *Abortion Rights Mobilization, Inc.*, *supra*.

REASONS FOR GRANTING THE PETITION

In our petition in *Baker* v. *Abortion Rights Mobilization, Inc., supra,* we explain that the district court manifestly and seriously erred in denying the government's motion to dismiss the complaint in this case for lack of standing. As explained in detail in that petition, the district court's determination to proceed to trial in this case amounts to a judicial usurpation of power that warranted the issuance of a writ of mandamus by the court of appeals. If this Court determines that certiorari should not be granted, the reasons set forth in the petition for that writ fully justify the issuance of a writ of mandamus directly by this Court pursuant to 28 U.S.C. 1651(a) and Rule 26 of the Rules of this Court. This Court has repeatedly recognized that, where a court has exceeded the limitations on its power in a manner seriously affecting the public interest and a remedy through the appellate process in unavailable, it is appropriate for this Court to issue an extraordinary writ. See, *e.g., De Beers Consolidated Mines Ltd.* v. *United States,* 325 U.S. 212 (1945); *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196 (1945); *Maryland* v. *Soper,* 270 U.S. 9 (1926). If the district court's determination to proceed to trial in this case in contravention of the limitations on its jurisdiction contained in Article III of the Constitution and expressed in this Court's decisions cannot be corrected by any other means, this Court should issue a writ of mandamus directing the district court to dismiss the action.

CONCLUSION

The petition for a writ of mandamus or prohibition should be considered with the petition for a writ of certiorari filed today in *Baker* v. *Abortion Rights Mobilization, Inc., supra.* If the relief sought by the government in that certiorari petition is not granted pursuant to that petition or in the related proceedings described in that petition, the petition for a writ of mandamus or prohibition should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1986

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20585

Nos. 86-157 and 86-162

Supreme Court, U.S.
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SEP 8 1986
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-157

JAMES A. BAKER, III, Secretary of the Treasury, and JAMES I. OWENS, Acting Commissioner of Internal Revenue,

Petitioners,

against

ABORTION RIGHTS MOBILIZATION, INC., *et alia,*

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

No. 86-162

In re JAMES A. BAKER, III, Secretary of the Treasury, and JAMES I. OWENS, Acting Commissioner of Internal Revenue,

Petitioners.

On a Petition for a Writ of Mandamus or Prohibition to the United States District Court for the Southern District of New York and the Honorable Robert L. Carter, Judge of the United States District Court for the Southern District of New York

RESPONDENTS' BRIEF IN OPPOSITION

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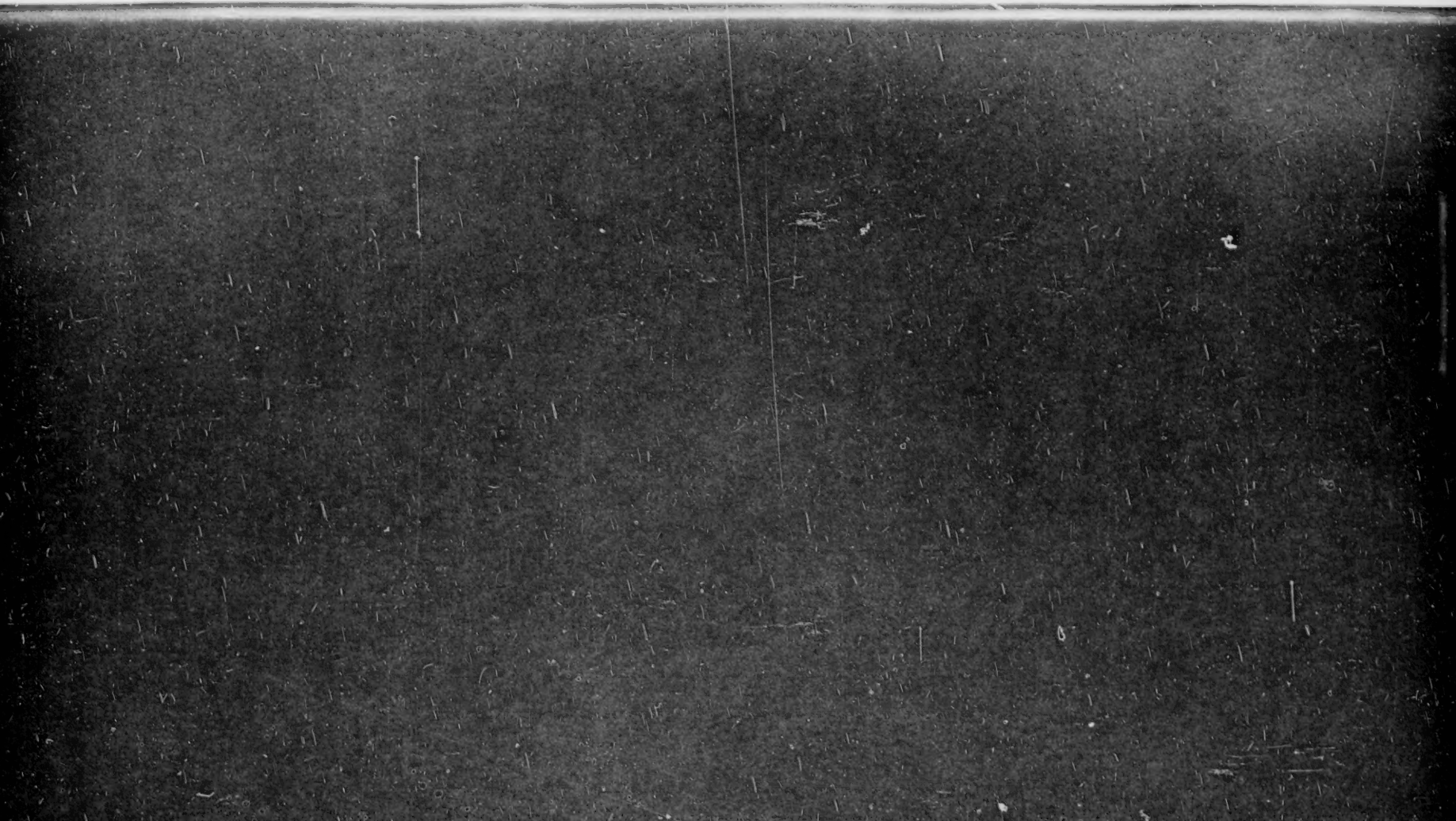

QUESTION PRESENTED

Whether a writ of mandamus or prohibition should issue to review the interlocutory decisions of the District Court denying petitioners' motions to dismiss for lack of standing when the District Court's determination is supported by rational and substantial legal argument and is reviewable in the ordinary course upon appeal from a final judgment?

PARTIES TO THE PROCEEDING

The petitioners, who are defendants below, are James A. Baker, III, Secretary of the Treasury, and James I. Owens, Acting Commissioner of Internal Revenue.

The respondents, who are plaintiffs below, are Abortion Rights Mobilization, Inc., Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau Inc., Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-157

JAMES A. BAKER, III, Secretary of the Treasury, and JAMES I. OWENS, Acting Commissioner of Internal Revenue,
Petitioners,
- against -

ABORTION RIGHTS MOBILIZATION, INC., et alia,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 86-162

In re JAMES A. BAKER, III, Secretary of the Treasury, and JAMES I. OWENS, Acting Commissioner of Internal Revenue,
Petitioners.

On a Petition for a Writ of Mandamus or Prohibition to the United States District Court for the Southern District of New York and the Honorable Robert L. Carter, Judge of the United States District Court for the Southern District of New York

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RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

These petitions seek extraordinary, interlocutory review of decisions of a District Court denying the petitioners' motions to dismiss the amended complaint for lack of standing. The Court of Appeals denied petitioners' request for a writ of mandamus and this Court should do the same.

The decisions below reveal no valid grounds for disregarding in this case the strong Congressional and judicial policy against interlocutory appeals. As the Court of Appeals recognized, this lawsuit should be permitted to follow the ordinary course of litigation and proceed to trial and final judgment without unwarranted, extraordinary appellate intervention.

The underlying action challenges the constitutionality of the Federal government's enforcement of § 501(c)(3) of the

Internal Revenue Code, 26 U.S.C. § 501(c)(3). Religious, charitable and other organizations exempt from taxation under that section are prohibited from

> participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

The amended complaint charges that the petitioners (sometimes referred to herein as "the government" or "the IRS") have exempted the Roman Catholic Church in the United States ("the Church" or "the Catholic Church") from the strictures of this statute and have allowed the Church -- but not the respondents or other voters or tax-exempt organizations -- regularly and persistently to intervene in political campaigns for public office to support or oppose candidates according to their views on abortion.

This unequal and discriminatory enforcement policy, respondents claim, violates their rights as voters and

clergy members under the Internal Revenue Code and the Establishment Clause of the First Amendment.

Petitioners' approach to the amended complaint has been to avoid the merits and seek dismissal on jurisdictional or technical grounds. Petitioners originally moved in March 1981 -- the amended complaint was filed in January, 1981 -- to dismiss for lack of standing and other reasons. (C.A.App.24)[1]

In its July 1982 opinion deciding petitioners' first motion to dismiss, the District Court dismissed certain of plaintiffs' claims but sustained the amended complaint in major part against the government defendants (the petitioners in this Court). (3a-41a)[2] The Court

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1/Reference to " a" is to the appendix to the petition for a writ of certiorari in this Court, No. 86-157. Reference to "C.A.App. " is to the appendix in the Court of Appeals.

2/The District Court dismissed several of plaintiffs' claims against the

[Footnote 2 continued on next page]

held that twenty-four plaintiffs had standing to sue. (3a-28a, 40a-41a)[3] They are:

-- *the clergy respondents*: Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, and the Women's Center for Reproductive Health which was founded by Reverend Lutz and is an extension of his ministry

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[Footnote 2 continued from previous page] government under the anti-injunction provisions of the tax code, 26 U.S.C. § 7421, the Declaratory Injunction Act, 28 U.S.C. § 2201, and for other reasons. The District Court also dismissed the complaint entirely against the United States Catholic Conference and the National Conference of Catholic Bishops for failure to state a claim against those two bodies. None of these findings is challenged in this proceeding.

3/The District Court dismissed entirely the claims of five plaintiffs, all health care facilities offering abortions, for lack of standing. Three more plaintiffs were subsequently dismissed by stipulation of the parties in March 1986. Fed. R. Civ. P. 41(a). Twenty-one plaintiffs (the respondents) remain.

(C.A.App.64-67). These respondents are clergy members whose religious beliefs concerning abortion differ significantly from the Catholic Church's. They have each have been active in the abortion rights movement but, unlike Catholic clergy, are prohibited from using the power of their pulpits and their tax-exempt funds to influence elections. (C.A.App.52-67)[4]

-- *the "voter" respondents*: All twenty individual plaintiffs, including the clergy members, were found to have standing as "voters." (18a) This group includes voters, campaign contributors,

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4/Each of the plaintiffs (except one) submitted an affidavit describing his or her particular concerns and injuries. (C.A.App.34-86) The District Court found that the clergy respondents "disclosed, in their affidavits, compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged establishment clause violations." (16a)

party officials and past and potential candidates for public office (C.A.App.35-37, 40-45, 52-67, 77-86)[5]

-- *the organization respondents*: Abortion Rights Mobilization, Inc. ("ARM"), and National Women's Health Network, Inc. ("NWHN"), both non-profit, tax-exempt organizations under § 501(c)(3), and Long Island National Organization for Women - Nassau, Inc. ("Nassau-NOW"), tax-exempt under 26 U.S.C. § 501(c)(4),[6] were found to have standing on behalf of their members who are voters. (18a-19a n.9)

The portions of the amended complaint (C.A.App.7-23) sustained by the

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5/Of the twenty individual plaintiffs whose standing was upheld, seventeen remain in the case. See n. 3, supra.

6/One significant difference between organizations exempt from taxation under § 501(c)(3) and those exempt under (c)(4) is that contributions to the former are deductible by the donor on his or her tax return whereas contributions to the latter are not deductible. 26 U.S.C. § 170.

District Court allege, in brief, that the Catholic Church, in violation of the clear language and intent of the anti-electioneering provision of § 501(c)(3), has engaged in a nationwide, persistent and regular pattern of intervening in elections in favor of candidates who support the Church's position on abortion and in opposition to candidates with opposing views.

The petitioners, the amended complaint alleges, despite their knowledge of these activities, have done nothing to enforce the law against the Church. They have not revoked the tax-exempt status of the Church, or any of its constituent parts, and have not taken any appropriate preventive or enforcement measures to redress these violations of law.

Petitioners, the amended complaint alleges, have thus exempted the Church from the tax code. This is the equivalent of a government subsidy of the

Catholic Church's partisan political activity, a subsidy that is denied the respondents and other voters and religious or charitable organizations.[7] This favoritism of the Catholic Church, the amended complaint charges, violates the tax code and the Establishment Clause of the First Amendment, and entitles respondents, among other things, to an injunction requiring the Internal Revenue Service to take appropriate enforcement action against the Catholic Church.

Following the District Court's decision, petitioners moved for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). The District Court denied certification in December 1982 (42a-45a), stating, among other reasons:

7/"Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization...." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983).

> The question concerning plaintiffs standing which the government seeks to have certified for review does not concern a dispute or disagreement as to the applicable law, but instead it involves whether the court's application of the decided and governing case law to the relevant facts is appropriate. I do not believe such issues were intended for certification under § 1292. (45a)

The District Court also noted that appellate resolution of the standing question would not have precedential value for other cases pending in the Circuit and that the Court of Appeals would be in a better position to review the issues after they "have been embellished by a full record in the proceedings below." (id.)

A year and a half later, following this Court's decision in Allen v. Wright, 468 U.S. 737 (1984), petitioners renewed their motion to dismiss. After carefully reviewing the Allen decision and finding it consistent with the court's prior determination, the District Court in

February 1985 denied the renewed motion to dismiss. (46a-55a) The government again sought certification under § 1292(b) and that too was denied for the same reasons as before. (56a-58a)

Unable to obtain a dismissal in the District Court, petitioners filed a petition for a writ of mandamus or prohibition in the Court of Appeals for the Second Circuit seeking interlocutory appellate review of the trial court's decisions on standing. The Court of Appeals denied the petition without opinion in January 1986 (1a-2a) and also denied the petition for rehearing and rehearing en banc. (67a) The two petitions to this Court follow that denial.

After the Court of Appeals denied the government's petition but before the instant petitions, the United States Catholic Conference and the National Conference of Catholic Bishops ("USCC/NCCB") announced to the District

Court that they would not comply with the deposition subpoenas duces tecum served upon them in 1983. Respondents moved for contempt which the District Court granted on May 8, 1986 (59a-66a), finding:

> In the court's view the USCC/NCCB have done more than simply exercise bad judgment; they have willfully misled the court and the plaintiffs and have made a travesty of the court process. (59a)

The USCC/NCCB have appealed the contempt order. The appeal was argued before the Court of Appeals on June 25, 1986 and has not yet been decided. At the argument, the general counsel of the USCC/NCCB stated that his clients did not object to the scope of the subpoenas on First Amendment, burden or any other grounds.[8] The sole ground advanced by the USCC/NCCB was that the plaintiffs did not have

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8/In the three years the subpoenas had been outstanding, the District Court had issued several orders narrowing their scope and protecting the confidentiality of internal Church documents.

standing to bring the lawsuit and that therefore the District Court did not have subject matter jurisdiction to hear the action and issue the subpoenas. (The substantial daily fine imposed by the District Court has been stayed pending the determination of the appeal.)

REASONS FOR DENYING THE PETITIONS

1. Mandamus Is Not Appropriate.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402 (1976). This is not such a case.

Mandamus and prohibition[9] are not substitutes for appeal to be invoked when

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9/As the petitioners point out, Cert. Pet. 20-21 n.10, the law governing the writs of mandamus and prohibition is effectively the same. We will follow petitioners' practice of using the term "mandamus" to refer to mandamus or prohibition.

interlocutory review is otherwise unavailable. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). As "the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by ... extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." United States Alkali Export Ass'n v. United States, 325 U.S. 196, 203 (1945)(emphasis added).

The Congressionally-mandated policy against interlocutory appellate review is a fundamental principle of the federal judicial system. As this Court stated in Will v. United States, 389 U.S. 90, 96 (1967), "[a]ll our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court."

The power to issue writs of mandamus poses an obvious threat to the policy against piecemeal appellate review. To protect and preserve the appellate principle, application of the power to issue extraordinary writs has been carefully circumscribed:

> A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

Kerr v. United States District Court, 426 U.S. at 403; Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).[10]

10/Because of its extraordinary and potentially disruptive character, mandamus jurisdiction is much narrower and more limited in scope than plenary appellate jurisdiction after final judgment.

> Appeals and extraordinary writs are, conceptually and functionally, quite different things. Appeals are conceived primarily as a device for correcting any errors which occur in the course of litigation; they are seen most importantly as the final part of the process through which justice in particular cases is done. Prerogative writs, at least as

[Footnote 10 continued on next page]

Petitioners offer no reason why this Court should depart from its long standing rule that mandamus is not available to obtain appellate review of "jurisdictional questions which [the lower court] was competent to decide and which are reviewable in the regular course of appeal." Roche v. Evaporated Milk Ass'n, 319 U.S. at 26.

Because the extraordinary writs are an exception to the policy against piecemeal appeals, they cannot be used to "control the decision of the trial court" but only to "confin[e] a court to its prescribed jurisdiction." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). "Jurisdiction," this Court

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[Footnote 10 continued from previous page]
traditionally conceived under "jurisdiction excess" theories, are seen as designed to correct errors so gross as to be almost foreign to the judicial system.
Note, "Supervisory and Advisory Mandamus Under the All Writs Act," 86 Harv. L. Rev. 595, 626 (1973).

stressed, does "not run the gauntlet of reversible errors." Id. at 382.

Therefore, where a decision by a trial court "even if erroneous ... involve[s] no abuse of judicial power..., [it] is reviewable upon appeal after final judgment" and not by a writ of mandamus or prohibition. Id. at at 382 (emphasis added; footnote omitted). As the Court noted in Bankers Life:

> In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the court by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power"....

Id. at 383 (footnote omitted).

As Judge Friendly has written, this Court has made "plain that mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of

the writ." United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972) (emphasis added). As this Court held in Will v. United States, 389 U.S. at 98 n.6:

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.

It is not grounds for granting the writ, as petitioners suggest (Cert. Pet. 24), that it would end the case, "thereby eliminating time-consuming and potentially troublesome discovery and trial." Such an argument could be made in almost any case. Its acceptance would effectively end the prohibition against interlocutory appeals and make mandamus available to every defendant who loses a motion to dismiss.

The policy against interlocutory appeals may well result in hardship and expense to litigants and, sometimes, to courts. But, "even though hardship may result from delay and perhaps unnecessary trial," and the order of the trial court "will give rise to a myriad of legal and practical problems as well as inconvenience to [the] courts," the peremptory writs cannot be used to circumvent the final judgment rule. Bankers Life & Casualty Co. v. Holland, 346 U.S. at 383. As this Court has often noted, "Congress must have contemplated those conditions in providing that only final judgments are reviewable." Id. See also Allied Chemical Corp. v. Daiflon, Inc., supra (holding mandamus unavailable to challenge order directing new trial).

In short, "[a]s extraordinary remedies, [the writs of mandamus and prohibition] are reserved for really extraordinary causes." Ex parte Fahey,

332 U.S. 258, 260 (1947). "[T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," Kerr v. United States District Court, 426 U.S. at 403; and he has "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" Bankers Life & Casualty Co. v. Holland, 346 U.S. at 384 (citation omitted).

Petitioners argue that mandamus is appropriate because this is an extraordinary case, because there will be "irreparable harm" if immediate review is not granted, and because the question presented is jurisdictional. As the Court of Appeals recognized, these arguments do not "clearly and indisputably" demonstrate a "usurpation of power" or "clear abuse of discretion" by the District Court reviewable by mandamus.

This is not an extraordinary case. Respondents' complaint challenges illegal

government activity. It charges that by failing properly to enforce the clear prohibition of 26 U.S.C. § 501(c)(3) against electioneering by tax-exempt organizations, petitioners have violated both the tax code and the Establishment Clause.

While respondents may be the first to challenge this particular governmental failure, the nature of the challenge and the form it takes are hardly novel or unusual. Many lawsuits are begun each day in the district courts of every circuit challenging alleged governmental illegal action of one sort or another. That the government -- or even the Internal Revenue Service -- is being charged with having violated the laws and Constitution of the United States surely does not make this an extraordinary case.

The standing questions raised below are also not extraordinary, new or novel. Although it may sometimes be difficult to

apply in specific cases, the legal standard to determine standing has been clearly articulated in a number of recent decisions of this Court. (See pp. 32-34, infra.) Indeed, the parties and the District Court have never disagreed as to the applicable legal test.

Whether respondents' claims satisfy the legal standard is certainly an issue within the traditional authority of the trial court to resolve. It "involve[s] application of well-known law to commonplace fact, and [the holding below] rested on the district judge's appraisal of facts and exercise of discretion. Whether the order below was correct or not, these bases for it involved no question of first impression." American Express Warehousing, Ltd. v. Transamerica Insur. Co., 380 F.2d 277, 283 (2d Cir. 1967).

The issue raised by the petitioners' motions below -- whether a suit challeng-

ing the constitutionality of the government's enforcement activities under one sub-section of the Internal Revenue Code may properly proceed to discovery and trial -- does not give rise to the kinds of extraordinary concerns raised in the cases cited by petitioners where mandamus was granted. Neither federalism nor the sovereignty of a friendly ally is put in jeopardy by the decision below. Maryland v. Soper, 270 U.S. 9 (1926); Ex parte Peru, 318 U.S. 578 (1943). Nor do the decisions below involve fundamental questions of the scope of the District Court's equity jurisdiction or require the resolution of a conflict between the concurrent jurisdiction of the courts and an administrative agency. DeBeers Consolidated Mines Ltd. v. United States, 325 U.S. 212 (1945); United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945). Indeed, it is the absence of any administrative activity that gives rise to this lawsuit.

Petitioners assert in vague but ominous terms that there will be "extreme consequences" and "irreparable harm" (Cert. Pet. 21, 23) from the District Court's decision if this case proceeds according to the ordinary rules of federal litigation.

Petitioners offer no clues or specifics, however, as to precisely what injuries, beyond those borne by every litigant, the government will suffer if required to defend this case. Petitioners do not assert that some vital, national security interest of the United States linked to the functioning of the Internal Revenue Service is threatened. The best that petitioners can do is to suggest that discovery "may" raise questions concerning the production of confidential tax information by the government and the constitutionally permissible scope of discovery from a religious institution. Cert. Pet. 23.

It is difficult to fathom how these potential issues threaten irreparable harm. The District Court has extensive power under the Federal Rules of Civil Procedure to issue any orders necessary to protect petitioners' and any witness' privileges and constitutional rights. Fed. R. Civ. P. 26(c). If such rights are in fact threatened, which has not happened, petitioners will have ample opportunity to raise their objections to discovery in the trial court.

The Catholic Church has already done so with respect to the subpoenas served on the USCC and the NCCB. In response the experienced and able District Judge narrowed the subpoenas and signed a confidentiality order negotiated by counsel. The USCC/NCCB appear satisfied with the result as they explicitly declined to raise any "First Amendment" or burden arguments on the appeal of their contempt citation.

In actual fact, the only "harm" to the government that future proceedings below might cause (aside from the prospect that the government might lose) is that faced by any defendant in a lawsuit -- the expense, time and inconvenience of discovery and trial. This "harm," as previously noted, is a necessary and perhaps unfortunate by-product of the policy against piecemeal appeals, but does not provide a basis for mandamus. Bankers Life & Casualty Co. v. Holland, 346 U.S. at 383; Roche v. Evaporated Milk Ass'n, 319 U.S. at 30.

Petitioners' claims ultimately reduce to an argument that this Court should adopt a new standard for mandamus to make it easier for the government to obtain interlocutory appellate review of an unfavorable jurisdictional determination against the government.

That such a rule is contrary to the history and purpose of mandamus jurisdic-

tion has already been shown. Petitioners are unable to cite a single case which adopts their argument. In fact, this Court and all the Circuits which have faced the issue have consistently held, with the Court of Appeals below, that jurisdictional questions are to be treated no differently from any other matter sought to be raised on a petition for a peremptory writ.

As this Court stated in Roche v. Evaporated Milk Ass'n:

> ...appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.

319 U.S. at 26.[11]

11/Consistent with the Supreme Court cases, the Third, Fifth, Eighth and Ninth Circuits and the Court of Customs and Patent Appeals (now the Federal Circuit) have each expressly held that traditional standards apply to petitions addressed to a trial court's determination of jurisdictional issues. The leading case is American Airlines, Inc. v. Forman, 204 F.2d 230 (3rd Cir.), cert. denied, 349

[Footnote 11 continued on next page]

[Footnote 11 continued from previous page]
U.S. 806 (1953), where Judge Hastie wrote:

> The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error.

204 F.2d at 232.

The other Circuits which have dealt with this issue have reached the same conclusion: Belcher v. Grooms, 406 F.2d 14, 17 (5th Cir. 1968); Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied sub. nom. Government of India v. Pfizer, 424 U.S. 950 (1976)("Further, the mere fact that a court might err even on jurisdictional questions does not necessarily amount to a usurpation of power making mandamus appropriate."); American Fidelity Fire Insurance Co. v. United States District Court, 538 F.2d 1371, 1375 (9th Cir. 1976)("While we might well decide the case differently if it were before us on appeal, we cannot conclude that there is no rational and substantial legal argument in support of the district court's decision."); Formica Corp. v. Lefkowitz, 590 F.2d 915, 920-22 (C.C.P.A.), cert. denied, 442 U.S. 917 (1979) (dismissing petition to review lower court decision upholding plaintiff's standing to sue).

That judicial "reluctance" governs here. It is plain from a simple reading of the opinions below that they represent the careful and well-reasoned application of the law of standing to the facts of the case. Judge Carter's two opinions do not demonstrate a "failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine." American Airlines, Inc. v. Forman, 204 F.2d 230, 231 (3rd Cir.), cert. denied, 349 U.S. 806 (1953). Rather, the opinions set forth "rational and substantial legal argument[s]" in support of their holdings, and represent a "course of judicial analysis and action [that is] the very antithesis of arbitrary conduct or usurpation of power." 204 F.2d at 233.

Although the test for standing can be simply stated, its "terms cannot be defined so as to make application of the constitutional standing requirement a

mechanical exercise." Allen v. Wright, 468 U.S. 737, 751 (1984):

> Determining standing in a particular case may be facilitated by clarifying principles or even clean rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. (Id. at 751)

The District Court conducted such a "careful judicial examination." A year in the drafting, the Court's first opinion thoughtfully analyzes each plaintiff's claim of standing against three separate theories of relief. The Court dismissed most of plaintiffs' standing claims, holding that none of the plaintiffs had standing to assert "equal protection" claims (24a-25a) and rejecting the claims of the individual (non-clergy) plaintiffs and all the organization and health care plaintiffs to maintain suit under the Establishment Clause. (11a-16a) Indeed, the Court dismissed

all the claims of the health care plaintiffs. (16a n.6, 40a)

After exhaustive analysis, the District Court sustained only the right of the clergy respondents to maintain claims under the Establishment Clause (16a-18a), and of the individual and organization respondents to sue as voters or on behalf of their members who are voters. (18a-23a)

The District Court's analysis on petitioners' renewed motion to dismiss three years later was equally thorough. The Court's second decision does not merely reiterate prior findings but carefully reviews at length each criterion for standing in light of the Allen decision and petitioners' arguments -- the same ones made here. (46a-55a)

This Court need go no further. The District Court's reasoned and deliberate decisions, even if wrong, are not reviewable on a petition for writ of mandamus.

In the ordinary course of litigation, the trial court's standing decisions will be reviewed by the Court of Appeal on appeal after final judgment. The Court of Appeals properly decided not to interfere with that process. This Court should do the same.

The petitions for writs of mandamus and certiorari should be denied.

2. Respondents Have Standing

Nonetheless, should this Court inquire into the merits of the District Court's decisions, it becomes readily apparent that the trial court correctly sustained the standing of the clergy and "voter" respondents.

The applicable standards have not been disputed by the parties or the District Court and can be fairly easily stated. Grounded in the "case or controversy" provisions of Article III of the

Constitution, the standing doctrine requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. at 751. In addition, the plaintiff must satisfy the so-called "prudential" concerns, "judicially self-imposed limits on the exercise of federal jurisdiction." Id.

Petitioners dispute the District Court's findings that the clergy respondents state a judicially cognizable injury under the Establishment Clause and that the injury stated by the "voter" respondents meets the causation and redressability tests -- that is, whether the injury can be said to be "fairly traceable" to petitioners' conduct and "is likely to be redressed by the requested relief." Petitioners also argue that the prudential limitation "barring

adjudication of generalized grievances more appropriately addressed in the representative branches," Allen v. Wright, 468 U.S. at 751, requires dismissal of the complaint. Petitioners' challenges are without merit.[12]

A. The Clergy Respondents: While a plaintiff's injury must be "'distinct and palpable,'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), and cannot be "'abstract' or 'conjectural' or hypothetical,'" Allen v. Wright, 468 U.S. at 751, it does not have to be economic.

12/The question of standing was raised by petitioners below on motions to dismiss the amended complaint. The Court, therefore, is required to accept as true all the material allegations of the amended complaint (C.A.App.7-23) and the additional affidavits submitted by respondents in opposition to the motion (C.A.App.34-86), and to construe these facts in the light most favorable to the respondents. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 n.22, 112 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

This Court has repeatedly recognized that a wide range of harms, including economic, aesthetic, environmental or spiritual, can constitute judicially cognizable injury-in-fact.[13] The Court has specifically held that violation of a plaintiff's "spiritual stake in First Amendment values" is sufficient injury to confer standing, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970):

> A person or a family may have a spiritual stake in First Amendment

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13/See, e.g., Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 111-12 (denial of right to interracial association); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 73-74 (1978) (environmental and aesthetic consequences of pollution); United States v. SCRAP, 412 U.S. 669 (1973) and Sierra Club v. Morton, 405 U.S. 727 (1972)(diminution of aesthetic and environmental interests in enjoyment of natural resources); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970)("'aesthetic, conservational and recreational'" interests); Abington School District v. Schempp, 374 U.S. 203, 208-10 (1963) (spiritual values).

> values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. Abington School District v. Schempp, 374 U.S. 203.

In Allen v. Wright, this Court reaffirmed that "stigmatizing injury" is the "sort of noneconomic injury [which] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755. The Allen Court cited with approval the Court's unanimous decision earlier the same Term in Heckler v. Mathews, 465 U.S. 728 (1984), where the Court stated:

> [A]s we have repeatedly emphasized, discrimination itself,...by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community,... can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

465 U.S. at 739-40 (footnote and citation omitted).

The Establishment Clause[14] was designed to protect against the "stigmatizing injury" that results from discriminatory treatment of religion by the government, the type of injury described in Heckler.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). As this Court has recognized, "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." Flast v. Cohen, 392 U.S. 83, 103 (1968). By creating "an atmosphere

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14/The Establishment Clause of the First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion...."

of official denominational preference," the government would deprive the nonpreferred religions of "the liberty to exercise and propagate [their] beliefs." Larson v. Valente, 456 U.S. at 245.

Direct governmental coercion is noticeably absent from violations of the Establishment Clause. The injury is the discrimination itself. In the words of Justice Black:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962).[15]

15/In this respect, injuries to rights protected by the Establishment Clause are often different than injuries caused by violations of other rights. The latter usually involve some sort of direct governmental coercion or action against an individual making pecuniary harm or restraint on individual freedom readily ascertainable.

Since coercion is not an element of an Establishment Clause violation, the Court has held that standing to challenge a violation of that Clause need not "include proof that [plaintiffs'] particular religious freedoms are infringed." Abington School District v. Schempp, 374 U.S. at 203, 224 n.9. (1963). Respondents here need only show that they are "directly affected by the laws and practices against which their complaints are directed." Id.

The clergy respondents are directly affected by the activities they challenge. Unlike the plaintiffs in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), the clergy respondents here do not rely on the abstract injury common to all citizens that results when the government acts illegally. Rather, clergy respondents suffer a distinct and concrete

stigmatizing injury that satisfies the standards set forth by this Court.

The respondents are each clergy members of religious institutions and denominations that do not share the Catholic Church's theological abhorrence of abortion. They are active in the abortion rights movement but are prohibited by law, and the threat of IRS enforcement, from using the power of their pulpits to influence political campaigns for public office. None has been exempted from the requirements of § 501(c)(3) in the same manner that the IRS has exempted the Catholic Church.

The government's failure to enforce the tax code against the Catholic Church directly and adversely affects the day-to-day lives of these clergy respondents. It interferes with their ability to minister to their congregations' needs and to gain public acceptance of their religious beliefs. It detracts from the

standing of their religions in the community.

The work of the clergy respondents is to practice and teach their particular religious beliefs. Since their congregations are tax-exempt under § 501(c)(3), respondents are prohibited from engaging in certain activities as clergy members, such as participating in campaigns for candidates for public office, which they could otherwise employ to obtain greater public approval or acceptance for their teachings.[16]

Catholic clergy, according to the amended complaint, have no such restraints placed by the government on their ability to preach their religious beliefs. Petitioners allow Catholic

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16/Engaging in these prohibited activities would lead to the loss of tax-exempt status under § 501(c)(3), and make it more expensive and difficult for respondents and their congregations to carry on their religious missions.

clergy to preach in the political arena, while denying that same right to respondents. This government favoritism of one religion over another, in violation of both the tax code and the Establishment Clause, makes it more difficult for respondents, vis-a-vis their Catholic counterparts, to convey their message and beliefs to their congregants and the public. It also denigrates respondents, their ministries and their religious beliefs by imparting a special dignity and status to Catholic political preachings and, by implication, its teachings on abortion, denying that same dignity and status to respondents' preachings:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Engel v. Vitale, 370 U.S. at 431.

As the District Court found after reviewing the affidavits of the clergy respondents:

> The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy....
>
> Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message. (16a-17a)(footnote omitted)

The clergy respondents' grievance, thus, is unlike that alleged in Allen v. Wright. The Allen plaintiffs could not claim that they personally had been subjected to discrimination as a result of the government's policy. 468 U.S. at 746. By contrast, respondents here are personally required to abide by the very

strictures of the tax code from which the government has exempted the Catholic Church. The clergy respondents are subjected every day of their professional, clerical lives to the discriminatory governmental policy they challenge.

This difference is made even more apparent when one examines the second and third elements of the standing test. In Allen, the Court held that plaintiffs' alternate ground for standing, that the government's actions had diminished their children's ability to attend racially integrated schools, was not "fairly traceable" to the challenged government conduct. The Court noted that it was "entirely speculative" whether a change in the government policy would increase the opportunity for respondents to attend integrated schools. 468 U.S. at 757, 758.

In the case at bar, however, the clergy respondents are personally denied

the opportunity to engage in partisan political activity and to foster their respective religious missions with the same official status and on the same statutory terms and conditions as another tax-exempt religious entity. This injury is caused solely by the improper and discriminatory enforcement of the law by the petitioners' favoring one religion over others, and can be readily redressed by a court order requiring the cessation of the offending practice. As the District Court found:

> [Respondents'] injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury. (18a, 49a)

A judicial determination requiring the Internal Revenue Service to end the preferential treatment of the Catholic Church and take appropriate action against the Church's electioneering will redress respondents' injury. Thenceforth, respondents and their Catholic brethren would be treated equally by the government.[17]

Accordingly, the District Court's determination that the clergy respondents have standing to maintain this action is correct.

17/Standing is not defeated simply because the challenged governmental activities are directed at persons other than the respondents. Such is almost always the case in Establishment Clause cases. See Engel v. Vitale, 370 U.S. at 438 (Douglas, J. concurring). See also Warth v. Seldin, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

B. "Voter" Standing: The District Court held further that respondents who were voters, campaign contributors (C.A.App.38-45), a past and potential future candidate for public office (C.A.App.84) and a political party official (C.A.App.60) had standing to bring this action under a theory of "voter standing."

The injury suffered by the "voter respondents" arises from the distortion of the political process caused by the petitioners' subsidizing of the partisan political activities of one participant in the political process, the Catholic Church, but not others, including the respondents.[18]

18/This Court has repeatedly recognized the constitutional "right to a vote free of arbitrary impairment by state action..." Baker v. Carr, 369 U.S. 186, 208 (1962). The government not only is prohibited from depriving individuals of their vote, but it also may not dilute the value of any vote. See, e.g., White v. Weiser, 412 U.S. 783 (1973); Reynolds v. Sims, 377 U.S.

[Footnote 18 continued on next page]

This injury is caused, not by the partisan political activity of the Catholic Church, but by government action, or more accurately, government inaction with respect to that political activity. This injury can be eliminated by an order which requires the government to enforce the tax code against, and to end its favoritism of, the Catholic Church. Such an order would eliminate the government-caused distortion of the political process and ensure that all participants will be governed by the same rules. If, thereafter, as petitioners speculate, the Catholic Church continues to engage in partisan political activities, it would have to do so on the same basis as respondents -- that is, by fore-

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[Footnote 18 continued from previous page] 533 (1964). See also Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C.Cir.), cert. denied, 464 U.S. 823 (1983); O'Hair v. White, 675 F.2d 680 (5th Cir. 1982)(en banc), and the cases cited by the District Court at 18a-21a, 51a.

going its tax-exempt status and by financing such activities without tax-deductible dollars.

The tax exemption for electioneering granted the Catholic Church by the petitioners distorts the political process as it subsidizes the Church's (and its contributors') political activities, while denying respondents the same benefit. This clearly diminishes the effectiveness of respondents' contributions to political candidates as compared to those of the Church and its donors. Since the respondents' political contributions are not deductible (beyond the very limited tax credit recently enacted, 26 U.S.C. § 41), it costs respondents considerably more to give $1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a donation to the Catholic Church. Candidates backed by the Church,

therefore, can raise funds more easily than the respondents' candidates.[19]

Respondents are harmed further when petitioners permit the Catholic Church, but not respondents, to use the power and prestige arising from the Church's standing in the community to partisan advantage, and to employ the Church's organization and membership structure to support or oppose political candidates. These advantages in the political process are denied respondents.[20]

19/It is an understatement to note that the ability to raise funds has a substantial impact on the outcome of political campaigns.

20/In fact, the power of the Catholic Church to influence electoral politics is enhanced by the added prestige that accompanies tacit government approval of the conduct of partisan political activities under the umbrella of the Church's § 501(c)(3) status.

> A qualified charity is placed on a pedestal above all other exempt organizations and above the many more non-exempt corporations in this country....Charities are selling and the public is buying. The public -- public schools, legislatures, courts and the news media included -- is

[Footnote 20 continued on next page]

Respondents do not challenge the right of the Catholic Church to support candidates.[21] They argue only that the government's support for and subsidy of that activity is unlawful and unconstitutional. It, therefore, does not matter whether the Church will continue to be active politically or if its members will increase their donations.

If the petitioners prohibit the Catholic Church from using tax-exempt, tax-deductible dollars to support or oppose candidates for political office in the same fashion that the petitioners now prohibit the respondents from engaging in such conduct -- that is, if the Catholic

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[Footnote 20 continued from previous page]
more likely to buy from the ones wearing the white hats.
O. Houck, "With Charity for All," 93 Yale L.J. 1415, 1429-30 (1984).

21/Contrary to the description of the case in the Cert. Pet., e.g., pp. 4, 7, respondents have made no allegations with respect to lobbying activities.

Church engages in electioneering at the same peril to its tax status as suffered by respondents -- the governmentally-caused arbitrary inequality of which respondents complain will have been eliminated.[22]

This case, thus, differs significantly from both Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), and Allen v. Wright, 468

22/Standing is not defeated by relief which removes the preferential treatment of the Catholic Church rather than bestowing that same favored status on plaintiffs. "The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." Heckler v. Mathews, 465 U.S. at 739. As Justice Brennan wrote for the Court, paraphrasing Justice Brandeis:

> [W]hen the "right invoked is that of equal treatment," the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Id. at 740, quoting Iowa - Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931)(emphasis in original).

U.S. 3315 (1984), upon which petitioners rely.

In Simon, the injury plaintiffs alleged was their inability to obtain hospital services without charge. Plaintiffs could not show, however, that a change in the IRS regulations they challenged would result in a change in the hospitals' policies towards indigent patients, as those policies were determined by many factors, only one of which was before the Court. Since the hospitals were free to deny plaintiffs medical services regardless of how the IRS regulations were drawn, the Court held that the respondents could not meet the causation or redressability requirements for standing.

In Allen, plaintiffs' injury was the diminished ability to obtain racially-integrated schooling. But, as in Simon, the Court found that since a change in the IRS policy might not affect the

segregated schools' admissions policies which were determined independently, the line of causation between plaintiffs' injury and the challenged action was too attenuated to support standing.

In the case at bar, however, the injury to respondents is not the Catholic Church's political activities per se, but the government's subsidy of those activities. If that tax benefit is removed -- by an order requiring equal enforcement of the tax code -- the cause of respondents' injury will also be removed.

As the District Court held:

> The judicially cognizable injury in Allen was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in ARM is unequal footing in the political arena, a condition completely traceable and within the control of the IRS. The Allen analysis and ARM's are, therefore, as one.... (52a)

C. Prudential Concerns: Petitioners rely heavily on Allen's analysis of the judicially-imposed prudential

limitations on standing to argue against standing here. Such concerns, however, do not defeat standing in this case.

In Allen the Court emphasized that while prudential limitations are grounded in separation of powers considerations, its holding "[did] not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." 468 U.S. at 761 n.26.

Plaintiffs in Allen had requested nation-wide relief in the form of an injunction compelling the IRS to adopt a new system of rules and regulations concerning enforcement of the policy against tax support for segregated schools. Because the plaintiffs "[did] not challenge particular identified unlawful IRS actions," 468 U.S. at 766, but only made "general complaints about the way in which government goes about its business," id. at 760, the Court held

that plaintiffs "allege[d] no connection between the asserted desegregation injury and the challenged IRS conduct direct enough to overcome the substantial separation-of-powers barriers" to the relief they requested. Id. at 766.

By contrast, respondents here do not challenge a general regulatory scheme but rather assert a narrower claim, alleging serious infringements of their constitutional rights directly caused by specified unlawful conduct of the IRS, the failure to enforce a specific prohibition in the tax code against a persistent and well-publicized offender.

Congress has prescribed in a clear and detailed manner the standards that govern the IRS here.[23] Section 501(c)(3)

23/As Justice Rehnquist has observed, "[w]ith undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status." Bob Jones University v. United States, 461 U.S. 574, 613 (1983)(dissenting opinion).

contains an absolute prohibition against partisan political activity by tax-exempt organizations. Neither the statute nor the Constitution gives the government discretion to permit one religious organization, but not others, to ignore this ban.

This case involves, not the structural concerns expressed in Allen, but traditionally judicially-cognizable issues concerning constitutional and statutory limits on governmental action. Respondents do not "seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties," 468 U.S. at 761; rather, respondents allege that petitioners are not fulfilling a specific legal duty at all.

As the District Court put it:

> Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy

> issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy. (28a, 54a-55a)

Cf. Allen v. Wright, 468 U.S. at 765 n.30 "The relatively simple either-or nature of the challenged decision affects the extent to which the initial complaint implicated separation-of-powers concerns...."

There can be no doubt that under separation of powers doctrine the judiciary plays an important role in monitoring the executive's enforcement efforts. It has been long settled and repeatedly reaffirmed by this Court that the Constitution requires the judiciary to protect the fundamental rights of all citizens and that relief from infringements of

those rights by the government cannot be left solely to the political process:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). The judiciary's proper role clearly extends to ensuring that administrative agencies do not violate explicit Congressional directives when those violations infringe on fundamental constitutional rights.

To rely on prudential notions of separation of powers would be peculiarly inappropriate where, as here, the infringement involves specific administrative activity which distorts and "restricts those political processes

which can ordinarily be expected to bring about [relief]..." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

Indeed, concern about the separation of powers argues in favor of invoking jurisdiction in this case, so as to prevent the tainting of the political process by specifically identified, unlawful and unconstitutional governmental action. As the Fifth Circuit recently held in a similar context:

> We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution of an individual's fundamental voting rights: when a complaint alleges injury stemming from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.

O'Hair v. White, 675 F.2d 680, 689 (5th Cir. 1982)(en banc).

Accordingly, the District Court's decisions on standing are eminently correct. Even if in error, they are

supported by rational and substantial arguments and should not be disturbed at this interlocutory stage by this Court.

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari to the Court of Appeals and for a writ of mandamus or prohibition to the District Court should be denied.

Respectfully submitted,

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Counsel wish to thank Dawn E. Johnsen, Yale Law School '86, for her invaluable assistance in the preparation of this brief.

Dated: September 5, 1986

Supreme Court, U.S.
FILED
SEP 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-157 and 86-162

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND LAWRENCE B. GIBBS, COMMISSIONER OF INTERNAL REVENUE, PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

IN RE JAMES A. BAKER, III, SECRETARY OF THE TREASURY, AND LAWRENCE B. GIBBS, COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE ROBERT L. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE PETITIONERS

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No. 85-162

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REPLY MEMORANDUM FOR THE PETITIONERS

In our petitions, we explain in detail that the district court's determination to proceed to trial in this case in the face of decisions by this Court that clearly demonstrate that

respondents lack standing amounts to a judicial usurpation of power that warrants the issuance of a writ of mandamus. We reply here briefly to point out how respondents' own response to our petitions further strengthens that conclusion.

1. Respondents recognize that it is well settled that they cannot pursue this lawsuit unless they demonstrate a " 'personal injury fairly traceable to [petitioners'] allegedly unlawful conduct and likely to be redressed by the requested relief' " (Br. in Opp. 33, quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Because respondents concededly do not complain about any actions of petitioners that are aimed at them or directly affect them, respondents attempt to satisfy this requirement by asserting that they suffer "personal injury" from the alleged preferential treatment of the Catholic Church by petitioners. They assert that the fact that the Catholic Church allegedly receives favorable tax treatment that respondents do not receive causes them some "stigmatizing injury" (Br. in Opp. 36-46) and, moreover, that this treatment harms respondents' ability to compete in the political marketplace because it "subsidizes the Church's (and its contributors') political activities, while denying respondents the same benefit" (*id.* at 49). Accordingly, respondents assert that elimination of the Church's tax exemption will alleviate their injury, even though it does not provide them any direct benefit, because it will yield equal treatment (*id.* at 54).

These contentions highlight the extent to which the district court's decision is irreconcilable with the well-established limitations on standing to sue to compel government action. Stripped to its essentials, respondents' allegation of "personal injury" is simply that the Catholic Church has received a tax benefit to which it is not entitled; because respondents are "competitors" of the Church in the political arena, anything that wrongly benefits the Church assertedly

harms respondents in a sufficiently personal manner to afford them standing. Approval of that theory of standing would drastically shift responsibility for the administration of the Internal Revenue Code from the Executive Branch to the courts. Any company could similarly claim standing to challenge the Internal Revenue Service's allowance of tax deductions to a business rival on the theory that an unjustified deduction causes direct personal injury to the complaining company by giving its competitor an unfair competitive advantage. Even IRS settlements of litigation viewed by a competitor as unduly favorable could presumably be challenged in court under this theory. The government's ability to administer the tax laws would be gravely impaired if every individual administrative tax decision made by the Internal Revenue Service were thus subject to judicial reexamination at the behest of third parties. Indeed, such claims could threaten to become a routine tactic of competition. In short, respondent's theory of standing is fundamentally at odds with the separation-of-powers concerns that underlie the standing doctrine.

2. Consideration of the actual relief that respondents conceivably could obtain in this lawsuit further demonstrates that the district court's decision upholding their standing contravenes the established principle that the courts should not be available to litigants who "seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen* v. *Wright*, 468 U.S. at 761). Respondents in their amended complaint seek declaratory relief—a statement that the government has violated the law in failing to revoke the Church's tax exemption—as well as injunctive relief in the form of an order directing petitioners to revoke the Church's tax exemption and to assess and collect back taxes due as a result of the revocation (C.A. App. 22-23). As a practical

matter, however, respondents cannot obtain any such relief in this lawsuit, even if they were to prevail entirely on all their contentions on the merits. An order by the district court here granting them the relief they seek would be as transitory as a rainbow.

The Catholic Church was long ago dismissed as a party from this suit—a decision with which respondents do not quarrel (see Br. in Opp. 4 n.2). If the district court entered an order directing petitioners to revoke the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action under Section 7428 of the Internal Revenue Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in district court. Because the Church is not a party to this litigation, the district court's decision here would have no res judicata or collateral estoppel effect in such later litigation. Thus, the issue of the validity of the Church's tax exemption would be resolved ultimately in another forum; any ruling here would be nothing more than a catalyst to the filing of another lawsuit. It is apparent therefore that respondents in this suit are seeking to exercise influence or control over the Executive Branch's allocation of its law enforcement responsibilities, not to obtain a binding resolution of a specific legal question. This Court has made it crystal clear that Article III does not permit them to invoke the courts for such a purpose.

For the foregoing reasons and those stated in our petitions, it is respectfully submitted that the petition for a writ of certiorari, or, alternatively, the petition for a writ of mandamus, should be granted.*

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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*We note that respondents have stated no objection to our suggestion (86-157 Pet. 25 n.13) that it would be appropriate for the Court to hold these petitions pending the Second Circuit's resolution of the appeal from the district court's order holding the Church in contempt.